

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

FILED BY CLERK

MAR 29 2007

COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,)	
)	
Respondent,)	2 CA-CR 2006-0374-PR
)	DEPARTMENT A
v.)	
)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
JOHN EDWARD FISHER,)	Rule 111, Rules of
)	the Supreme Court
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-23119

Honorable Terry L. Chandler, Judge

REVIEW GRANTED; RELIEF DENIED

John Edward Fisher

Buckeye
In Propria Persona

H O W A R D, Presiding Judge.

¶1 Petitioner John Fisher was convicted in 1988 of kidnapping, aggravated assault, and attempted sexual assault. He admitted having four prior felony convictions, and the trial judge found he had been on parole at the time he committed the offenses. As a result, Fisher was sentenced to concurrent terms of life imprisonment pursuant to former

A.R.S. § 13-604.02(A). *See* 1987 Ariz. Sess. Laws, ch. 307, § 5. On appeal, this court affirmed Fisher’s convictions and sentences for kidnapping and attempted sexual assault and reduced the aggravated assault conviction to simple assault. *State v. Fisher*, No. 2 CA-CR 88-0485 (memorandum decision filed July 17, 1990). In 1997, this court denied relief on Fisher’s petition for review of the trial judge’s denial of post-conviction relief. *State v. Fisher*, No. 97-0048-PR (memorandum decision filed Dec. 4, 1997).

¶2 Fisher filed a second petition for post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., 17 A.R.S., in June 2006. The trial court summarily denied relief, and Fisher now seeks review of that ruling. We review for an abuse of discretion a trial court’s ruling in a post-conviction proceeding. *State v. Decenzo*, 199 Ariz. 355, ¶ 2, 18 P.3d 149, 150 (App. 2001). We find no such abuse here.

¶3 Fisher contends the trial court abused its discretion in rejecting his claims that he was entitled to have a jury determine his release status pursuant to *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348 (2000), and that the 1993 amendment to § 13-604.02 should be applied retroactively to him. He also challenges the court’s rejection of his belated claim, not raised until his reply, that his 1996 Rule 32 counsel was ineffective in failing to raise the claim about the statutory amendment. *See* Ariz. R. Crim. P. 32.5 (post-conviction petition shall include “every ground” for challenging judgment or sentences); *State v. Cohen*, 191 Ariz. 471, ¶ 13, 957 P.2d 1014, 1017 (App. 1998) (appellate court does not address issues first raised in reply brief).

¶4 We agree with the trial court that Fisher is not entitled to relief. The court is correct that the holding in *Apprendi* does not apply retroactively to defendants whose convictions were final at the time *Apprendi* was decided. *See State v. Sepulveda*, 201 Ariz. 158, n.2, 32 P.3d 1085, 1086 n.2 (App. 2001). We note, however, that Fisher’s convictions did not become final on the date we filed our decision on his appeal. Instead, they became final on August 30, 1990, when we issued our mandate, and Fisher did not seek further review. *See State v. Towery*, 204 Ariz. 386, ¶ 8, 64 P.3d 828, 831 (2003).

¶5 In 1993, the legislature amended § 13-604.02(A), effective January 1, 1994, to reduce the life imprisonment term required for offenses committed while a person was on release from confinement to at least a presumptive prison term to be served in its entirety. 1993 Ariz. Sess. Laws, ch. 255, §§ 9, 98. Fisher argues the change was procedural and can therefore be applied retroactively to him. The trial court agreed the amendment was procedural but disagreed it was retroactive, noting Fisher’s appeal was not pending at the time the amendment became effective.

¶6 But the legislature expressly provided that the amendment applied “only to persons who commit a felony offense after the effective date of this act.” 1993 Ariz. Sess. Laws, ch. 255, § 99. Thus, the distinction between procedural and substantive changes is irrelevant to the amendment. Moreover, as our supreme court has recently reminded us, no statute is retroactive unless it expressly says it is. *Garcia v. Browning*, ___ Ariz. ___, ¶ 7,

151 P.3d 533, 535 (2007); *see* A.R.S. § 1-244. In any event, the trial court correctly ruled the claim is precluded because Fisher did not raise it in his first post-conviction proceeding.

¶7 Finally, although the trial court was not required to address Fisher’s ineffective assistance of counsel claim because it was untimely raised, we conclude the court did not abuse its discretion in denying relief on the claim. Fisher is not entitled to post-conviction relief on the claim, not only because the 1993 statutory amendment does not apply to him as noted above but also because, having been tried by a jury and having appealed his convictions and sentences, Fisher is not entitled to the effective assistance of counsel in a post-conviction proceeding. *See State v. Pruett*, 185 Ariz. 128, 130, 912 P.2d 1357, 1359 (App. 1995).

¶8 Although we grant the petition for review, we deny relief.

JOSEPH W. HOWARD, Presiding Judge

CONCURRING:

JOHN PELANDER, Chief Judge

GARYE L. VÁSQUEZ, Judge